

***7 Official Opinions of the Compliance Board 58 (2010)***

**Exceptions Permitting Closed Session – Legal Advice – Consultations  
with in-house counsel addressing opinions of other lawyers not  
present during meeting within exception**

**Exceptions Permitting Closed Sessions – Collective Bargaining –  
Discussions concerning whether to ask union to reopen  
negotiations within exception**

November 16, 2010

*Allen Dyer, Esquire*  
*Howard County Board of Education*

The Open Meetings Compliance Board has considered your complaint that the Howard County Board of Education (“County Board”) violated the Open Meetings Act in connection with a closed meeting held on August 19, 2010.

Though you yourself are an elected member of the County Board, you stated that you were filing the complaint in your individual capacity.

For the reasons explained below, we find that no violation occurred.

**I**

**Complaint and Response**

According to the complaint, the County Board closed its meeting on August 19, 2010, under the authority of §10-508(a)(7) and (9).<sup>1</sup> These provisions authorize a public body to close a meeting in order to consult with counsel to obtain legal advice and to either conduct collective bargaining negotiations or consider matters related to collective bargaining negotiations, respectively. In the complainant’s view, however, “much and possibly all of the discussion ... should have taken place in open session.”

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<sup>1</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

Although not mentioned in the complaint, the County Board also relied on §10-508(a)(13) in closing the meeting on August 19, 2010. This provision authorizes a public body to close a meeting to the public to “comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter[.]”

The complaint outlined a series of events leading up to the closed session, including the County Board's ratification of collective bargaining agreements with employee bargaining units, the reduction of the County Board's contribution towards employee health benefits, and the impact of the federal regulations implementing the federal health care legislation enacted this year. Outside counsel had been retained to advise the County Board on implications of federal law. Outside counsel provided a draft legal memorandum; an email from staff indicated that the closed meeting scheduled for August 19 would involve negotiations. Before the August 19 meeting, the complainant sent an email to the school system's Chief Financial Officer, with copies to other elected members of the County Board, seeking clarification about the negotiations to be discussed and questioning the County Board's authority to renegotiate a collective bargaining agreement as well as the legality of a closed meeting under §10-508(a)(9).

During the August 19 meeting, following a motion to close the meeting, the complainant again questioned the legality of the closed session to discuss whether to reopen negotiations. In response, Ms. Ellen Giles, chair of the County Board, offered a letter from Judith Bresler, the County Board's counsel, which Ms. Giles said provided justification for closure. The County Board voted to close the meeting, with the complainant voting in opposition. The complaint identified the County Board members and eight staff members present during the closed session. Among those present was Mark Blom, the school system's general counsel. Three confidential documents were distributed during the closed session - (1) a legal memorandum by outside counsel Amy Gordon captioned "Contract Changes with Regard to the Patient Protection and Affordable Care Act"; (2) a cost analysis report by the school systems' chief financial officer; and (3) "Parameter Recommendations for all Bargaining Units Closed Session on 8/19/10." According to the complaint, neither Ms. Gordon nor Ms. Bresler was present or available by telephone; Mr. Blom was present, but "he did not present himself as the author or co-author of any legal memorandum or letter of advice presented during the meeting."

The Superintendent started the closed session with a brief introduction, the Chief Financial Officer explained the cost analysis, and the Director of Finance presented a more detailed analysis. The Superintendent indicated that the County Board needed to decide whether to ask the union to reopen negotiations. The complainant argued that discussions whether to seek the reopening of negotiations should be considered in open session, a position that was not followed. Following an extensive discussion of legal and financial options, the County Board voted to seek to reopen negotiations, a vote in which the complainant abstained.

The complainant argued that reliance on §10-508(a)(7) was inappropriate in that the only lawyer representing the school system who was present during the closed session was not the source of advice. The complaint further noted that, once legal advice is provided, a public body must return to open session to discuss policy implications of advice it had received. As to §10-508(a)(9), the complaint noted that this provision must be strictly construed. Citing a prior Compliance Board opinion, the complainant argued that to come within the exception, discussions must have a “direct and material bearing on the conduct of negotiations.” In this matter, the County Board had “no assurance that the union [would] agree to renegotiate the ... agreement nor ... is it clear, without public discussion, whether it is in the public’s interest to have the ratified ... agreement renegotiated.” Further, in the complainant’s view, “the mere possibility of the union returning to the negotiating table immediately after a successful conclusion of the negotiating process is too remote to justify closure under §10-508(a)(9).”

In a timely response on behalf of the County Board, Judith Bresler explained that the County Board adjourned from open session to a closed session pursuant to §10-508(7), (9), and (13), “to receive legal advice regarding negotiated agreement and to discuss potential re-opening of negotiations.” According to the response, “[t]he subject matter dealt with legal advice the Board of Education received on the impact of interim final rules of the Patient Protection and Affordable Care Act on the administration of employee health benefits under collective bargaining agreements ... with employee unions and further negotiations with the unions. ... In the closed session, Board members, staff, and the school system’s General Counsel, Mark Blom, discussed the legal opinion [the County Board] received ... and what it meant to the school system. There was [also] discussion of an opinion by Special Counsel to the Board of Education regarding the Board of Education’s legal responsibilities under the laws governing collective bargaining...” Other matters reportedly discussed were legal parameters to be provided to the County Board’s negotiators should the unions agree to reopen negotiations.

The response disputed the suggestion that the lawyer who authored particular legal advice need be present in order for a public body to invoke §10-508(a)(7). According to the response, “[i]t was not a violation of the Open Meetings Act to consult with the school system’s General Counsel about legal opinions authored by [outside counsel] on the health care legislation or by [Ms. Bresler] on ... collective bargaining laws.” As to the County Board’s reliance on §10-508(a)(9), the response noted that “[t]he discussion in closed session related to whether the Board of Education had an obligation to seek

negotiations ... and, if so, what ... parameters ... did the Board ... want to set.” The latter matter, according to the response, “directly related to negotiations.”<sup>2</sup>

## **II**

### **Analysis**

The Open Meetings Act allows a public body to close a meeting in order to “consult with counsel to obtain legal advice.” §10-508(a)(7). Like every exception under §10-508(a), this exception must be narrowly construed. §10-508(c). As the complaint correctly noted, we have previously opined that this exception can not be invoked unless counsel is actually present. *See 1 OMCB Opinions* 145, 149 (1995). But we have never suggested that advice on a legal issue must come from a single lawyer. There is nothing inappropriate about in-house counsel providing legal advice in connection with a matter previously addressed by a public body’s outside counsel. Of course, a lawyer’s presence must amount to more than a potted plant. The exception only applies if counsel is present and legal advice is being provided. *3 OMCB Opinions* 16, 20 (2000); *see also 5 OMCB Opinions* 130 (2007). Based on the response, it appears that Mr. Blom did actually provide legal advice in connection with the two subjects that were addressed by other lawyers in written memos. To the extent members of the County Board sought Mr. Blom’s views as to these matters or Mr. Blom provided an overview of the legal issues addressed, the County Board was entitled to rely on §10-508(a)(7).

Of course, had §10-508(a)(7) been the sole basis for closure, the County Board would have been required to return to open session to discuss any policy implications that might flow from the legal advice provided. §10-508(b); *see 6 OMCB Opinions* 151, 153-54 (2009). There is no question that part of the discussion would not qualify for legal advice, such as the fiscal implication presentations presented by the school system’s chief financial officer and director of finance. Thus, the question remains were these matters appropriately addressed in a closed session in reliance of §10-508(a)(9).

As noted in the complaint, we have previously held that, to come within the exception, “discussions must have a ‘direct and material bearing on the conduct of negotiations.’” *4 OMCB Opinions* 104, 109 (2004), *citing 3 OMCB*

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<sup>2</sup> Included with the response were copies of the closing statement prepared in connection with the August 19 meeting and the minutes of the closed session that date. Unless the public body chose to make the latter document available to the public, the Compliance Board is required to maintain the confidentiality of closed session minutes submitted for its review. §10-502.5(c)(2)(iii).

*Opinions* 245, 249 (2002). In the 2004 opinion, we noted that “[n]ot every discussion of how to apply an *existing* collective bargaining agreement to a set of facts is covered by the exception.” (emphasis in original) In that opinion, the board of education had acknowledged that there was never any discussion of amending an existing agreement. While recognizing that the issue could arise in future collective bargaining negotiations, we held that this possibility was too remote to justify closure under §10-508(a)(9). In the 2002 opinion, we addressed a county governing body’s decision to close a meeting under §10-508(a)(9) involving negotiations between a board of education and employees’ representatives. Even though the county governing body played no direct role in the negotiations, we decided that reliance on the exception was appropriate given that the topic was the availability of county funds to pay for benefits under a potential collective bargaining agreement.

Here the discussions concerning the impact of recent federal regulations and the desirability to reopen negotiations were linked. The decision to explore reopening negotiations apparently would not have occurred absent the legal questions and fiscal impact on the County Board driven by the federal interim final regulations. Even though collective bargaining agreements had been recently ratified, in our view, the county board’s discussions concerning the possibility of approaching the union about reopening negotiations and parameters of such negotiations should they occur fell within §10-508(a)(9) in that the discussion involved “matters that relate to ... negotiations.” Thus, we find that no violation occurred.

The complaint argued that “the mere possibility of the union returning to the negotiating table immediately after a successful conclusion of the negotiating process is too remote to justify closure under §10-508(a)(9).” However, it might also be argued that participation in negotiations is a continuing responsibility that does not necessarily end once a contract is ratified. We express no opinion as to this matter since it goes beyond interpretation of the Open Meetings Act. We simply note that the Court of Appeals has recognized that whether negotiations are in “good faith” is “a subjective measure which can be applied only in light of the totality of the circumstances.” *Carroll County Educ. Ass’n, Inc. v. Bd. of Educ. of Carroll County*, 294 Md. 144, 151, 448 A.2d 345 (1982) (internal cite omitted). In our view, §10-509(a)(9) is not to be construed so narrowly as to preclude a public body from relying on the exception when it meets to consider in good faith whether to ask a union to reopen negotiations on a particular matter.<sup>3</sup>

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<sup>3</sup> As noted above, the County Board also cited §10-508(a)(13) in closing the meeting. Reliance on this provision was not further addressed in the record; therefore, we express no opinion as to its merits. But we remind the County Board that the Act does not permit an exception under §10-508(a) to be invoked absent a bona fide basis. 3 *OMCB Opinions* 345, 348 (2003).

**III**

**Conclusion**

In our opinion, the County Board did not violated the Open Meetings Act when it meet in closed session under §10-509(a)(7) and (9) on August 19, 2010, to confer with a school system attorney on two matters on which the County Board previously received written advice from other counsel and to evaluate whether to request that collective bargaining negotiations be reopened in light of recent federal interim final rules impacting employee health benefits.

OPEN MEETINGS COMPLIANCE BOARD

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